



The Palestinian Centre for Human Rights

***Position Paper:
Death Penalty under the Palestinian National Authority***

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Palestinian Centre for Human Rights

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Introduction

The death penalty is one of the most outstanding issues that have the attention of human rights defenders and international legal and human rights organizations. It violates one of the fundamental human rights, which is the cornerstone of other rights, that is the right to life, and constitutes the most severe degree of torture and cruel and inhuman treatment. Consequently, article 3 of the Universal Declaration of Human Rights¹ prohibits the use of the death penalty and emphasizes that “everyone has the right to life, liberty and security of person.” This right, as prescribed by article 5 of the Declaration, includes that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” including the death penalty.

Many international and regional conventions² and instruments were produced, emphasizing provisions in the Universal Declaration of Human Rights with relation to the right to life. They called overtly for the non-application of the death penalty, excluding in exceptional cases and under specific conditions and norms. In this context, article 6-1 of the International Covenant on Civil and Political Rights³ prescribes that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Paragraph 2 of the same article determines the conditions and norms of the application of the death penalty, stating that “in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.” Even though this paragraph allows the application of the death penalty under certain limits, paragraph 5 of the same article prohibits the imposition of death sentences “for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.” The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was introduced in December 1984. It ensures individuals' right to enjoy humane treatment and prohibits all forms of torture and cruel and degrading treatment. Death penalty constitutes the most severe degree of cruel, inhuman and degrading treatment.

Continued international efforts aimed at abolishing the death penalty resulted in the declaration of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,⁴ which seeks to abolish the death penalty. This Protocol was opened for signature in December 1989 and entered into force on 11 July 1991. It consists of 10 Articles which address the death penalty. Article 1 (1) of this Protocol provides that “No one within the jurisdiction of a State Party to the present Protocol shall be executed. Article 1 (2) requires States Parties to the Protocol to take “all necessary measures to abolish the death penalty within its jurisdiction.”

As a part of following up measures that must be taken by the States Parties to the Protocol to ensure the application of the provisions of the Protocol, Article 3 urges the States Parties to take all measures

¹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

² These conventions and instruments include the European Convention on Human Rights and the American Convention on Human Rights.

³ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A of 16 December 1966.

⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 128/44 of 15 December 1989.

necessary to apply the provisions of the Protocol and to include these measures in the reports which are submitted to the Human Rights Committee: "The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol."

These efforts made unprecedented progress, which was considered as historic victory, when the UN General Assembly voted on 18 December 2007 in favor of a resolution proclaiming a global moratorium on death penalty with a view to abolish it. This resolution is the fruit of continued international efforts exerted in particular by civil society organizations, especially those working in the area of human rights, aiming at the abolition of death penalty at both the executive and legislative levels.

After complicated discussions and deliberations, the UN General Assembly voted in favor of the resolution with a vast majority (104 vs 54, with 29 abstentions). The vote for the resolution was expected in view of what was adopted on 15 November 2007 by the General Assembly's Third Committee, which deals with human rights issues.

It is unfortunate that only one Arab State, Algeria, voted in favor of the resolution while the other Arab States members in the General Assembly voted against it, abstained from voting or did not participate in the sessions. This indicates the difficulties faced by human rights organizations calling for the abolition of death penalty in the Arab World. The Resolution states that: "... Considering that the use of the death penalty undermines Human dignity, and convinced that a moratorium on the use of the death penalty contributes to the enhancement and progressive development of Human Rights, that there is no conclusive evidence that the death penalty's deterrent value and that any miscarriage or failure of justice in the death penalty's implementation is irreversible and irreparable,"

In response to continued international efforts aimed at the abolition of death penalty and further to the previous Resolution of 18 December 2007, the United Nations General Assembly adopted on 18 December 2008 a second resolution calling for a moratorium on the use of the death penalty with a view to abolition. The results showed considerable increase in the number of States that voted in favor of the resolution. One hundred and six countries voted in favor of the resolution, 46 voted against it and 34 abstained. It was also unfortunate that the majority of Arab Countries voted against the resolution or abstained. Nine Arab countries voted against the resolution: Egypt; Iraq; Kuwait; Libya; Qatar; kingdom of Saudi Arabia; Sudan; Syria; and Yemen, while six other Arab countries abstained: Jordan; Bahrain; United Arab Emirates; Lebanon and Sultanate of Oman.

This increasing international objection of the application of death penalty invites us to be optimistic that international efforts against the death penalty have gotten much closer to the total abolition of this penalty. According to Amnesty International, more than two-thirds of the countries in the world have now abolished the death penalty in law or practice. The numbers are as follows:

Abolitionist for all crimes: 95
Abolitionist for ordinary crimes only: 9
Abolitionist in practice: 35
Total abolitionist in law or practice: 139
Retentions: 58⁵.

⁵ <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>

Death Penalty in Palestinian National Authorities Areas

The Palestinian National Authority (PNA) inherited many laws and legislations that were applicable before its creation in 1994. The legal system in Palestine is a unique one in view of the exceptional conditions that affected the region across the different historical eras. Many administrations and regimes governed Palestine, including the Ottoman rule that lasted for approximately five centuries, the British mandate between 1917 and 1948, the Jordanian administration in the West Bank and the Egyptian administration in the Gaza Strip, and finally, the Israeli military orders. After the signature of the Interim Agreements between the Palestine Liberation Organization (PLO) and Israel in September 1993, the late Palestinian President Yasser Arafat issued a decree dated on 20 May 1994 to maintain the application of all the laws and regulations which were applicable before the war of 05 June 1967. Accordingly, the PNA has applied the death penalty in accordance with article 37 of the Penal Law (74) of 1936 applicable in the Gaza Strip, and article 14 of the Jordanian Penal Law (16) of 1960 applicable in the West Bank. In addition to these two laws, the PNA referred in the application of the death penalty to the PLO Revolutionary Penal Law of 1979, which legalizes the application of the death penalty, but has not been approved by the Palestinian Legislative Council (PLC).

Since its creation in 1994, the PNA issued 105 death sentences against persons convicted of various crimes, including crimes related to national security.⁶ Most of those sentences were issued by State Security Courts, which were established in February 1995. The late Palestinian President Yasser Arafat issued a presidential decree establishing these courts, without determining their mandates or the nature of cases to be considered by them.⁷ PCHR and other human rights organizations have continued to call for the abolition of the State Security Courts on the basis that they routinely violate fundamental human rights, including the right to fair trial before an independent and impartial court and to appeal against sentences to a higher judicial body.

Trials in State Security Courts are summary; the accused are not given time to prepare a defense and are denied access to effective legal counsel. In addition, technical reports prepared by independent judicial authorities such as the criminal and forensic laboratories are not allowed to be presented in such trials. Sentences issued by these courts, including death sentences and life imprisonment, are cruel ones which cannot be appealed before a higher body.

In spite of criticism by human rights organizations directed to the PNA for the establishment of State Security Courts, the PNA implemented a number of death sentences issued by these courts. Moreover, in November 1999, the PNA invented the post of the Attorney General of State Security Courts, which further enhanced the operation of these courts in areas under its jurisdiction.

Since the creation of the PNA in 1994, different Palestinian courts (the Military Courts, the State Security Courts and the Civil Courts) have issued 105 death sentences. Eighteen of these sentences were implemented, including 16 ones implemented in the Gaza Strip and two ones in the West Bank. Diagram I illustrates percentages of death sentences issued by the different Palestinian courts. The Percentage of death sentences issued by military courts is the highest, followed by death sentences

⁶ According to PCHR's documentation.

⁷ See Presidential Decree 49 of 1995 on the establishment of State Security Courts in the Palestinian official gazette, issue 4, 6 May 1995.

issued by the State Security Court before its abolition in 2003. The percentage of death sentences issued by civil courts is 16%.

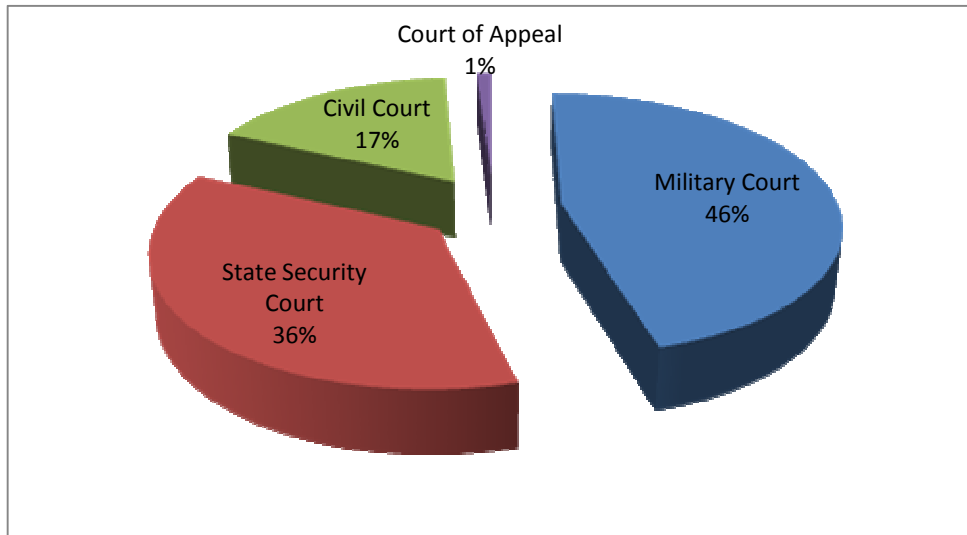


Diagram I: Sentences issued by different Palestinian courts

At the operational level, there has been many controversies relating to the death penalty in the PNA controlled areas since the PNA's creation in 1994. Palestinian courts have issued more than one hundred death sentences for different charges, including 51 death sentences for willful killings, 47 sentences for collaboration with foreign parties in reference to the Israeli occupation forces, three sentences for raping and killing crimes and three sentences for raping.

Some death sentences were implemented rapidly without giving required legal time limit. They were implemented in a way that reflected selectivity in response to pressures exerted by the public. Some death sentences were implemented in less than 48 hours after their issuance. The case of officer Ahmed Ateya Abu Mustafa, from Khan Yunis refugee camp, was a glaring example of such sentences. Abu Mustafa was sentenced to death on 24 February 1999 on charges of raping a child, and the sentence was implemented on 26 February 2010; i.e., within 48 hours after the issuance of the sentence. On the other hand, the implementation of other death sentences was delayed to unknown times and many of the concerned sentenced persons managed to escape from prison and from punishment. Many other Palestinians who were sentenced to death were executed in public areas by armed groups in cruel and inhumane manners.

Diagram II illustrates that 68% of death sentences issued by Palestinian courts have not been implemented. This raises concerns regarding discrimination and selectivity in the implementation of the death penalty, especially in view of the existence of an official decision requiring the non-implementation of death sentences in response to a general plan against death penalty.

Diagram II also illustrates that since the creation of the PNA, 15% of Palestinians sentenced to death were executed in public areas by armed groups which do not present the law, while 17% of death sentences were officially implemented by the PNA, which implemented 18 death sentences, including 16 in the Gaza Strip and two in the West Bank.

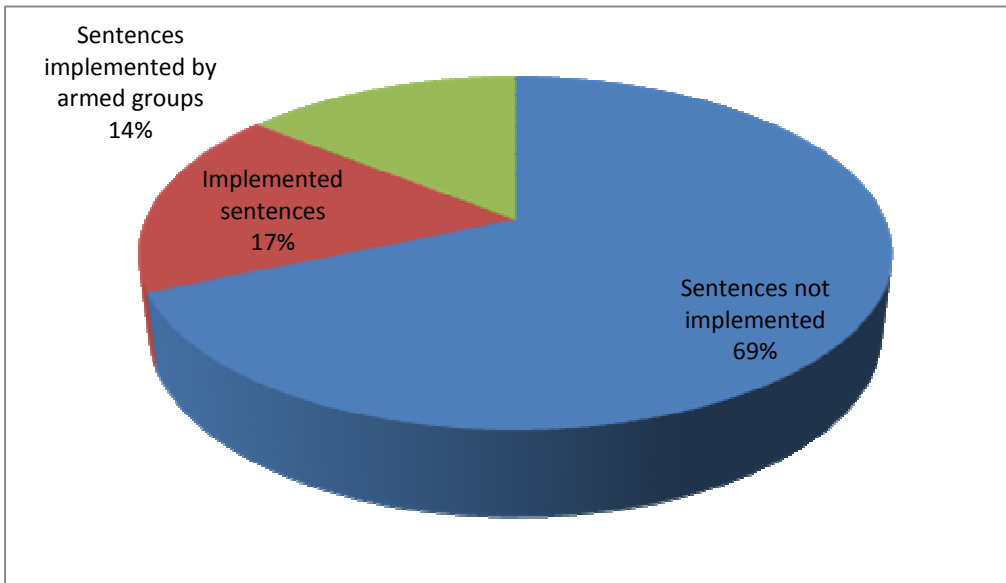


Diagram II: Death Sentences and executive parties since the establishment of the PNA

Indicators show that 2005 and the current year, 2010, witnessed the highest rates in the implementation of death sentences in comparison with other years. In 2010, five death sentences have been implemented, while no death sentences were implemented in 2006. On the other hand, the year 2009 witnessed the highest rate in the issuance of death sentences. Seventeen death sentences were issued in 2009, including three sentences in the West Bank and 14 others in the Gaza Strip.

Diagram III illustrates the rate of death sentences that have been issued since the creation of the PNA and the death sentences that have been implemented by year:

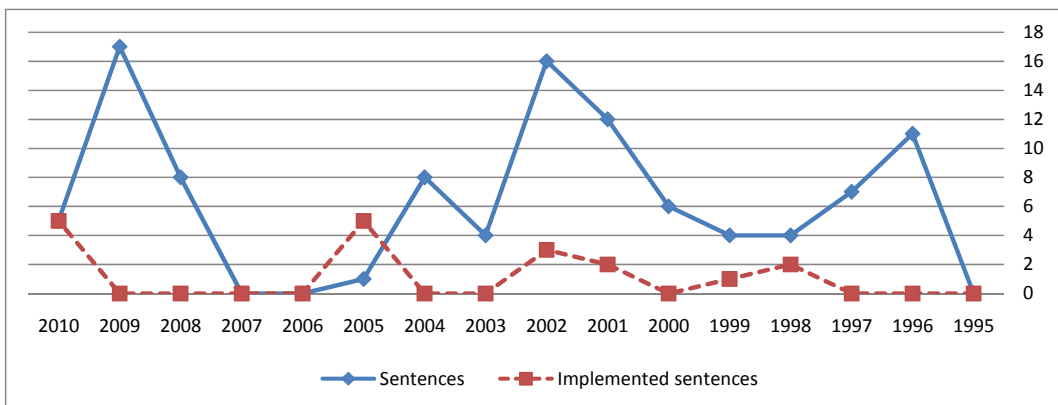


Diagram III: The rate of sentences which were implemented and which were not implemented by year

By studying the different death sentences that have been issued, it is noticed that death sentences issued in the Gaza Strip are higher than those issued in the West Bank. We call upon all the concerned parities, including persons in authority and decision makers, to study this phenomenon from psychological and sociological perspectives and to take necessary action.

Diagram IV illustrates the percentage of sentences issued by Palestinian courts in the Gaza Strip versus those issued by courts in the West Bank. 79% of death sentences were issued by courts in the Gaza Strip compared to 21% death sentences issued by courts in the West Bank. The percentage in the Gaza Strip is very high if we consider the higher population in the West Bank compared to the Gaza Strip.

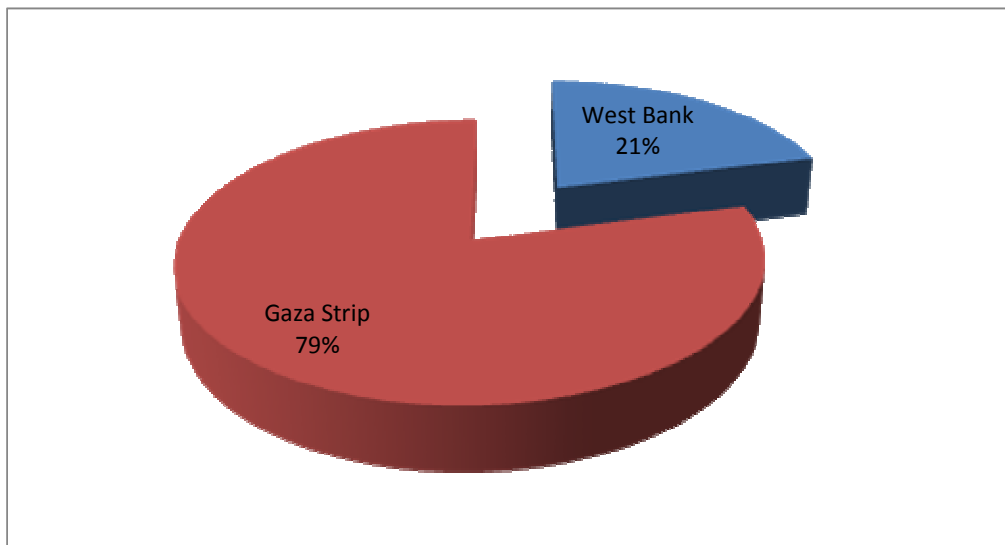


Diagram IV: Percent of sentences issued in the West Bank compared to those issued in the Gaza Strip

Death Penalty in Under the Ongoing Fragmentation

The ongoing Palestinian fragmentation has resulted in an unprecedented deterioration of the human rights situation in the West Bank and the Gaza Strip. There has been an increase in the number of officials in the Gaza government and leaders of Hamas calling for the implementation of death sentences for different reasons, through looking for means that enable the government to implement death sentences. The last year, 2009, witnessed a debate on the President's constitutional right to ratify death sentences in light of the President' abstention from ratifying death sentences issued in the Gaza strip and the West Bank since 2005, before the beginning of the Palestinian fragmentation in June 2007. PCHR highly appreciated this position of the President.⁸

In an interview published on 26 March 2009 on the website of the Palestinian police in the Gaza Strip, Ahmed Atallah, head of the Military Justice, stated, in response to the President's ratification of death penalty, that: "If the President's intransigence remains the only obstacle to the implementation of death sentences, we are studying the resistance jurisprudence. We have a new approach in Palestine in which the legal jurisprudence depends on the comparative legal jurisprudence which means looking for similar laws. We are studying both comparative and resistance jurisprudences which serve our people and which realize justice and achieve the objectives of our people and of the victims' families if the sentenced persons are killers."⁹

⁸ See Ref. 50/2010, PCHR letter to the President on 10 May 2010, 'PCHR Appeals to Palestinian President to Stop Application of Death Penalty.'

⁹ See the website of the Palestinian police at: www.police.ps/ar/news-news-action-show

In the same context, the Government in Gaza bases its justification and calls for the implementation of death sentences on the expiry of the term in office of the Palestinian President on 25 January 2009. The government considers the President's position to be vacant in accordance with Article 36 of the Palestinian Basic Law. It refers to Article 46 of the Basic Law that requires the Council of Ministers to assist the President in the performance of the President's duties and exercise of powers to ratify the implementation of death sentences. The Ministry of Justice in the Gaza government issued a press release on 18 April 2010, in which it indicated that the President's term had expired: "The Palestinian President's term expired on 09 January 2009. The President's post is considered to be vacant in the time being since the expiry of the presidential term which is 4 years in accordance with Article 36 of the Basic Law. Whereas Article 46 of the Basic Law stipulates that 'the Council of Ministers shall assist the President in the performance of the President's duties and exercise of powers, in the manner stipulated in this Basic Law,' the Government refers to this Article which grants it powers to assist the President to undertake his functions which are stipulated in the Basic Law. These functions include ratification of death sentences."

In the same context, these attempts were accompanied by statements by executive authorities affiliated with the government in Gaza. In a statement given by the Interior Minister, Fathi Hammad, to al-Quds radio and quoted by the website of the Ministry of Interior, he stated that: "The near future will witness implementation of death sentences." He added that the government is not committed to human rights organizations' positions. On 24 March 2010, the website of the Interior Ministry quoted statements given by the Attorney General in Gaza, Counselor Mohammed Abed, as saying that "Two months ago, the Office of the Attorney General in Gaza has started the ratification of death sentences issued against collaborators and those who committed willful killing crimes." According to the Interior Ministry's website, the Attorney General pointed to drug dealers: "It is better that we accelerate the execution of those who preferred to execute their people and society."¹⁰

On 15 April 2010, the Interior Ministry in Gaza implemented death sentences by firing squad against Naser Salama Abu Freih, 35, from Izbet Abed Rabbu in the east of Jabalia, and Mohammed Ibrahim Ismail al-Saba, 36, from Rafah in the southern Gaza Strip. With disregard to the Palestinian Basic Law, the Ministry implemented, on 18 May 2010, death sentences by hanging against three Palestinians from Gaza city: Motreb Harb al-Shobaki, 35; Rami Said Mohammed Juha, 25; and Amer Saber Husein Judeya, 33. The Basic Law provides that the ratification to death sentences is an exclusive right granted to the President of the PNA in accordance with the Penal Procedures Code no. 3/2001 and that the implementation of death sentences not ratified by the President is illegal and in violation of the Constitution.

In view of these serious implications which reflect a real setback in the respect for human rights and the rule of law, many human rights organizations published press releases to condemn the implementation of these sentences. They expressed concerns over these negative developments and warned of their impacts on human rights and the rule of law. They stressed that the disagreement between the two parties in the Gaza Strip and the West Bank is not legally motivated, explaining that the law is clear in this regard. They noted that the disagreement is politically motivated and that the two parties conflict for powers which must be interpreted for the interest of the victims, not against them. They further pointed out that death sentences can be replaced or delayed at least until the settlement of the ongoing power conflict.

¹⁰ See PCHR Press Release, Ref 20/2010, 'PCHR Expresses Deep Concern Regarding Official Statements on Death Penalty Application in the Gaza Strip,' 25 March 2010.

As PCHR is totally aware of the seriousness of the Palestinian situation in view of the ongoing fragmentation and its results and of the disruption of joint work between Palestinian institutions, namely PLC which is competent to enact legislations and laws, and further to our previous positions rejecting the enactment of legislations in view of the ongoing fragmentation, whether legislations enacted by the Change and Reform Bloc at PLC and published in the Official Gazette in Gaza, or those issued by the presidential Institution with the force of law in view of the PLC's absence and inability to undertake its functions under the ongoing political fragmentation, PCHR stresses that we reject these legislations is based on our concerns that this situation may lead to perpetuating the ongoing fragmentation through the creation of two separate legal systems and the creation of a complicated situation that can not be changed. PCHR reiterates our adherence to our previous positions and believes that it is urgent that all concerned parties intervene promptly in order to stop the ongoing deterioration and save lives threatened by the implementation of death sentences, especially in view of the recent implementation of death sentences against five Palestinians in the Gaza Strip. This number represents 28% of death sentences that have been implemented since the creation of PNA. Also in view of continued threats by officials in Gaza government to implement more death sentences in violation of the law under the pretext of the expiry of the presidential term, PCHR calls upon the Palestinian President to use powers granted to him in accordance with Article 43 of the Palestinian Basic Law which stipulates that "The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, ... , to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance," in order to issue a decree requiring the non-ratification of death sentences as a completion of his position concerning the non-ratification of death sentences since 2005. PCHR highly appreciate this position.

PCHR's Position

In light of the debate over the feasibility of the death penalty, and despite continued application of it by many countries in the world, including the United States, PCHR reiterates its rejection for the death penalty for the following reasons:

1. PCHR believes that the death penalty constitute a flagrant, unjustified violation of the right to life. Thus, it undermines opportunities for individuals to enjoy other rights, which makes it necessary to abolish it all over the world, including in Palestine, to ensure and protect human civil, political, economic and social rights.
2. PCHR believes that this punishment is the most severe form of cruel and inhuman treatment, and thus, violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. PCHR asserts that the application of the death penalty harms the human dignity and undermines human rights, including the right to life and the right to receive human treatment.
3. PCHR believes that the death penalty does not constitute a deterrent to crimes, as the experiences of countries which apply the death penalty, such as the United States, China and Saudi Arabia, have proved that it can never ensure stability in the society and the non-recurrence of crimes. Consequently, the application of the death penalty is a form of retaliation aiming only at killing.
4. PCHR contends that the application of the death penalty leads to disastrous consequences, as victims of the death penalty lose their lives, which makes it one of the most severe forms of punishment, as it is irreversible.

5. PCHR emphasizes that the abolishment of the death penalty does not mean in anyway indulgence with those who are convicted of serious crimes, but other forms of punishment which maintains the human dignity should be considered. PCHR's position concerning the death penalty is professional and moral. It is not related to a specific case, and does not contradict the rule of law, for which PCHR steadily struggle.
6. PCHR reiterates its position that PNA must prosecute collaborators who are an integral part of the occupation's infrastructure and of its most dangerous tools implanted in the body of the Palestinian people. However, PCHR notes that the abolition of death penalty does not imply tolerance with these collaborators, but to look for a punishment which is deterrent and which maintains our humanity in the same time.
7. Reiterates that the ratification of death sentences is an exclusive right of the PNA President in accordance with the Penal Procedure Code no. 3/2001. The implementation of any death sentences without the President's ratification constitutes extra-judicial executions.
8. Any attempts to override the President's powers under any justifications only serve one agenda, which is the continuation and perpetuation of the ongoing fragmentation.

PCHR's Demands

1. PCHR calls upon the Palestinian President Mahmoud 'Abbas to use his constitutional authorities and not ratify death sentences, precluding the implementation of such severe punishment which violates the right to life.
2. PCHR highly appreciates the decree issued by President 'Abbas on 22 June 2005, stipulating the retrial in civil courts of all those convicted in State Security Courts. PCHR calls upon President 'Abbas to use his constitutional authorities and continue the retrial in civil courts of all those convicted by State Security Courts. Since the beginning of 2006, 11 of such cases have been transferred to civil court.
3. PCHR calls upon the Palestinian Legislative Council (PLC) to reconsider Palestinian laws related to the death penalty, particularly article 37 of the Penal Law (74) of 1936, which is applicable in the Gaza Strip; article 16 of the Jordanian Penal Law (16) of 1960, which is applicable in the West Bank; and the Penal Law 3 of 2001. PCHR calls upon the PLC to promulgate modern laws that are consistent with international human rights instruments, including those which call for the abolishment of the death penalty.
4. PCHR calls upon the PLC to incorporate international human rights instruments into the Palestinian domestic laws, especially the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, to ensure that the death penalty will not be applied in the future.